BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of	)	
MANHATTAN COLLEGE,	)	
Employer,	)	
- and -	)	**Case No. 02-RC-023543**
MANHATTAN COLLEGE ADJUNCT FACULTY UNION, NYSUT, AFT, NEA, AFL-CIO,	)	
Petitioner.	)	

EMPLOYER'S REPLY ON MOTION FOR THE RECUSAL OF MEMBER NANCY SCHIFFER

On October 30, 2013, Employer Manhattan College ("Employer" or "Manhattan College") filed a Motion for the recusal of Member Nancy Schiffer (the "Motion"). The Motion is based on Member Schiffer's employment as Associate General Counsel for the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") at the time that the AFL-CIO appeared as amicus curiae in this case. This association necessitates Member Schiffer's recusal pursuant to applicable ethical principles regardless of whether she was personally involved in the preparation or submission of the AFL-CIO's amicus brief.

On December 4, 2013, Petitioner Manhattan College Adjunct Faculty Union, NYSUT, AFT, NEA, AFL-CIO ("Petitioner") filed a Response to the Motion (the "Response"). Without citing to any evidence, Petitioner states that "Member Schiffer was not involved in any way in the preparation or submission of the amicus brief submitted by the AFL-CIO in this matter . . . ." (Response, at 1). Not only is this assertion without foundation, but, even if true, Member

Schiffer's recusal would still be required pursuant to applicable ethical principles. Petitioner also asserts that Member Schiffer's recusal is unwarranted because the AFL-CIO was not technically "a party" to this case. *Id.* Again, however, this fact is irrelevant for the purposes of the Motion, as Member Schiffer's recusal is necessary despite the fact that her former client and employer, the AFL-CIO, is not technically a party to this action.

As set forth more fully below, Petitioner's arguments in opposition to the Motion are not only without merit, but invite Member Schiffer to set an ethical standard below that of the federal judiciary, below that of other federal administrative agencies, and indeed, below that of former Board members. Manhattan College respectfully submits that Member Schiffer should decline this invitation, and must recuse herself from this matter based on the plain language of well-accepted ethical principles and to avoid an appearance of impropriety that could undermine the public's trust in the Board as an adjudicatory body.

ARGUMENT

I. PETITIONER'S ARGUMENTS OPPOSING RECUSAL SHOULD BE REJECTED

Petitioner offers three arguments in opposition to the Motion: (i) Member Schiffer need not recuse herself pursuant to 5 C.F.R. § 2635.502 or Executive Order 13490 (Jan. 21, 2009) because her former client and employer, the AFL-CIO, is not a party to the instant matter; (ii) Member Schiffer need not recuse herself pursuant to 28 U.S.C. § 455 ("Section 455") because this statute does not apply to Members of the Board; and (iii) even if Section 455 were the applicable standard, that standard would not require Member Schiffer to recuse herself from this matter. These arguments are without merit. Manhattan College addresses each in turn.

A. Petitioner's arguments regarding 5 C.F.R. § 2635.502 and Executive Order 13490 are irrelevant to the Motion.

In its Response, Petitioner spends a great deal of time asserting that Member Schiffer need not recuse herself under 5 C.F.R. § 2635.502 or Executive Order 13490 because technically her former client and employer, the AFL-CIO, neither is nor represents a "party" to this proceeding. (Response, at 3–5). Thus, Petitioner argues that the fact that the AFL-CIO filed a brief in this case while Member Schiffer was employed there as an Associate General Counsel is of no moment. However, Manhattan College has not moved for Member Schiffer's recusal under either 5 C.F.R. § 2635.502 or Executive Order 13490, and has not alleged that the AFL-CIO is or represents a party in this action. Accordingly, these arguments are irrelevant to the Motion.

B. Petitioner's argument that Section 455 does not apply to Members of the Board disregards precedent and asks Member Schiffer knowingly to hold herself to a lower ethical standard than one that is well-accepted by the federal judiciary and multiple executive agencies, including the Board.

Petitioner's second argument in opposition to recusal is that Manhattan College cannot rely on Section 455 because this statute does not apply to Members of the Board. (Response, at 5). This argument disregards the Board's own precedent as well as the fact that numerous executive agencies in addition to the Board have adopted Section 455 as their governing ethical standard. Indeed, Manhattan College has found no case—and Petitioner has cited to no case—in which an agency adjudicator refused to recuse him- or herself where such recusal would be warranted under Section 455. More significantly, this argument asks Member Schiffer to turn a blind eye to well-accepted ethical principles.

First, Petitioner does not dispute the fact that Section 455's standards are routinely applied to officials of executive agencies, including Members of the Board. Indeed, in *Overnite*

Transp. Co., 329 NLRB 990, 998 (1999), then Member Wilma Liebman expressly stated on a motion for her recusal that the standards articulated by Section 455 "should apply as well to officials of administrative agencies, such as Members of the National Labor Relations Board." Petitioner does not—because it cannot—make any attempt whatsoever to distinguish or otherwise address this statement.

Nor does Petitioner attempt in its Response to address why the NLRB should hold itself to a different ethical standard than the various other executive agencies that have adopted Section 455's ethical standards as their own. *See, e.g.*, *Lee v. E.P.A.*, 115 M.S.P.R. 533, 545 (Dec. 9, 2010) (policy of Merit Systems Review Board is to apply Section 455(a) in assessing disqualification); *Appeal of Envtl. Safety Consultants, Inc.*, 06-2 BCA P 33321, 2006 WL 1806497, *1 (A.S.B.C.A. Jun. 19, 2006) (the Armed Services Board of Contract Appeals "looks to Section 455 for guidance on recusal issues"); *Hydro Resources, Inc.*, 47 N.R.C. 326, 331 (Jun. 5, 1998) (holding Nuclear Regulatory Commission Licensing Board members to same disqualification standards that apply to federal judges); S.E.C. Release No. 38545 (April 24, 1997) (Securities and Exchange Commission adopting a standard for recusal that "borrows heavily from the conflict of interest standard applicable to federal judges" under Section 455(a)); *Am. Gen. Ins. Co. v. FTC*, 589 F.2d 462, 463 (9th Cir. 1979) (citing Section 455 in analyzing disqualification of FTC Commissioner); *Letter to Designated Agency Ethics Official dated November 16, 1983*, Office of Government Ethics, 83 x 18, at 2 (Nov. 16, 1983) (in analyzing whether recusal of unnamed agency's Commissioner was warranted, stating that "[b]ecause the Commission's proceedings are adjudicatory in nature, we believe that guidance may be drawn from the rules applicable to judges").

At base, Petitioner's sole argument for declining to apply Section 455 to Members of the Board is that, according to Petitioner, Section 455 provides "at most, 'useful guidance' in interpreting the governing ethical standards[.]" (Response, at 5). However, this argument not only disregards Member Liebman's statement in *Overnite Transp.*, but also misconstrues former Member Craig Becker's statement in *Serv. Emp. Int'l Union Local 121RN*, 355 NLRB No. 40 (June 8, 2010), that "the standards set forth [in Section 455] as well as their construction by the courts offer useful guidance in the application of" the ethical standards that expressly apply to Board Members. *Id.* at *9; s*ee also Caterpillar, Inc.*, 321 NLRB 1130, 1132–33 (1996) (Chairman William Gould, on a motion for his recusal, stating that he "take[s] seriously the [recusal] standards applicable to judges"); *id.* at 1134–37 (Member Peggy Browning, in analyzing her proposed recusal under Section 455, stating that "the standards for disqualification of administrative adjudicators and judges are clearly compatible").

Thus, despite Petitioner attempts to construe the Board's position with respect to Section 455 as providing "at most" useful guidance, no Board Member has ever failed to apply it. Ultimately, Petitioner's attempt to circumvent Section 455's ethical standards simply because they were initially drafted for the federal judiciary should be rejected, and Member Schiffer should hold herself itself—as have her fellow Board members—to the well-accepted principles articulated by that statute.

C. Notwithstanding Petitioner's arguments to the contrary, Member Schiffer's recusal is required pursuant to Section 455.

Petitioner's Response asserts that even if Section 455 does set forth the applicable standard for recusal in this matter, Member Schiffer's recusal is not required by that statute. Petitioner's arguments lack merit.

Manhattan College first explained in its Motion that Member Schiffer's recusal is required under Section 455(b)(2), which obligates an adjudicator to disqualify him- or herself from a matter "[w]here . . . a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter." 28 U.S.C. § 455(b)(2). The basis for this argument is that Member Schiffer practiced law at the AFL-CIO with three lawyers—Lynn K. Rhinehart, James B. Coppess, and Laurence E. Gold—who, during Member Schiffer's tenure there, filed the AFL-CIO's amicus brief in the instant matter and therefore served as "lawyer[s] concerning this matter" during their association with Member Schiffer.

In a futile attempt to distinguish this case, Petitioner asserts—without citing to a single authority—that the involvement of Member Schiffer's prior colleagues in this matter "did not rise to the level of" serving as lawyers concerning this matter "because they did not represent a party to this action." (Response, at 6). This argument, however, is contrary to the plain words of Section 455(b)(2), which requires disqualification where, as here, lawyers with whom Member Schiffer practiced law are serving as lawyers concerning a matter before her. Section 455(b)(2) contains no indication that recusal is warranted only where lawyers who practiced law with an adjudicator serve as lawyers "for a party" in the matter, and there is no authority interpreting Section 455(b)(2) in this way. To the contrary, authority interpreting Section 455 is clear that its recusal requirements are not "limited . . . to cases in which the judge's conflict was with the parties named in the suit." *Preston v. United States*, 923 F.2d 731, 734–35 (9th Cir. 1991) (mandating judge's recusal based on prior association with a law firm that represented only an "interested party" to the litigation, which "present[ed] a risk that the judge's impartiality in the case . . . might reasonably be questioned by the public"); *see also Hampton v. City of Chicago*, 643 F.2d 478, 478 (7th Cir. 1981) (upholding district court judge's decision to recuse "on the

basis that his impartiality might reasonably be questioned since he could be linked to the filing of an amicus curiae brief . . . during an earlier stage of [the] litigation").

Further, as evidenced by Member Liebman's opinion in *Overnite Transp.*, Section 455(b)(2) applies where a Board Member worked with other lawyers during her in-house tenure with a union. 329 NLRB at 999 (declining to recuse on the basis that "none of the lawyers with whom [she] practiced while employed at the Teamsters" served during their association as lawyers in the matter pending before her, thus implying that the outcome would have been different had Member Liebman worked with lawyers who *were* involved in the matter before her). Thus, contrary to Petitioner's singular, unsupported assertion, Member Schiffer's recusal is warranted under Section 455(b)(2).

Similarly misplaced is Petitioner's argument that Member Schiffer need not recuse herself under Section 455(a), which requires recusal when an adjudicator's "impartiality might reasonably be questioned" so as to "avoid[ ] even the appearance of impropriety whenever possible." 28 U.S.C. § 455(a); *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865 (1988). Petitioner argues that recusal is not warranted by Section 455(a) because Member Schiffer "did not participate in the preparation or approval of" the AFL-CIO's amicus brief and because the AFL-CIO is neither a party nor representing a party to this action. (Response, at 6).

As an initial matter, Petitioner offers no evidence for its assertion that Member Schiffer was not involved in any way in the AFL-CIO's amicus brief. The very fact that Petitioner purports to have private knowledge regarding Member Schiffer's involvement with the AFL-CIO's amicus brief is indicative of the close relationship between Petitioner and the AFL-CIO. Indeed, it is ironic for Petitioner on the one hand to make such an issue of the fact that the AFL-CIO is not technically a party to this litigation while on the other hand plainly working with the

AFL-CIO and accepting the AFL-CIO's support as one of its member unions. This only highlights the need for Member Schiffer to recuse herself to avoid any appearance of impropriety in this matter.

Moreover, even if Member Schiffer did not participate in the filing of the AFL-CIO's amicus brief, "a reasonable person with knowledge of all the facts would [still] conclude that [her] impartiality might reasonably be questioned" given her decade-plus tenure with the AFL-CIO in a small office of about eight lawyers during the time that three of her colleagues filed the AFL-CIO's amicus brief in this matter. *United States v. Winston*, 613 F.2d 221, 222 (9th Cir. 1980). In addition, and as already discussed, Section 455 applies where, as here, the adjudicator's conflict is with an interested party and is not limited to conflict with a party named in the pending litigation. *See Preston*, 923 F.2d at 734–35 (9th Cir. 1991). Finally, Petitioner's argument that a reasonable person would not question Member Schiffer's impartiality in this case is belied by the public statement of a union's lawyer in a similar case that he "expected that [Member] Schiffer would refrain from taking part on the case." Ben James, *NLRB Member's Recusal Sought In Faculty Organizing Case*, Law 360, Dec. 6, 2013 (reporting on a pending motion by the employer for Member Schiffer's recusal in *Point Park Univ.*, Case No. 06-RC-012276) (attached hereto as Exhibit A). In *Point Park Univ.*, as here, AFL-CIO lawyers with whom Member Schiffer practiced filed an amicus brief in support of the petitioner union during Member Schiffer's tenure as AFL-CIO Associate General Counsel. Certainly if a union's own lawyer would expect recusal in that instance, a reasonable person would believe that recusal is warranted here.

II. PETITIONER DOES NOT DISPUTE THAT MEMBER SCHIFFER MUST RECUSE HERSELF FROM THIS MATTER UNDER 5 C.F.R. § 2635.101

The basic ethical obligations for federal administrators—including Members of the Board—are set forth at 5 C.F.R. § 2635.101 ("Section 101"). Pursuant to Section 101, Members of the Board must avoid even the appearance of impropriety in order "[t]o ensure that every citizen can have complete confidence in the integrity of the Federal Government." 5 C.F.R. § 2635.101(a). Manhattan College argues in its Motion that Member Schiffer must recuse herself pursuant to the requirements of this regulation, and Petitioner has made no attempt to oppose this basis for recusal. Accordingly, Manhattan College respectfully refers Member Schiffer to the portion of its Motion advocating for recusal under Section 101. (Motion, at 7).

III. PETITIONER DOES NOT DISPUTE THAT MEMBER SCHIFFER MUST RECUSE HERSELF FROM THIS MATTER IF SHE PARTICIPATED IN ANY WAY IN PREPARING OR SUBMITTING THE AFL-CIO'S AMICUS BRIEF

Petitioner has represented—though without reference to any source—that Member Schiffer "was not involved in any way in the preparation or submission of" the AFL-CIO's amicus brief in this matter. (Response, at 1, 6). As an initial matter, Member Schiffer's participation with respect to the AFL-CIO's amicus brief need not have been direct or extensive in order to warrant recusal. To the contrary, "[i]nvolvement in preliminary discussions, in interim evaluations, in review or approval at intermediate levels, or in supervision of subordinates working on a matter" may require recusal. *Memorandum dated April 26, 1999, from Stephen D. Potts, Director, to Designated Agency Ethics Officials Regarding Recusal Obligation and Screening Arrangements*, Office of Government Ethics, 99 x 8, at 4 (Apr. 26, 1999). Thus, if Member Schiffer had any involvement whatsoever with respect to the AFL-CIO's amicus brief in this matter—and as Petitioner does not contest—her recusal is required for the reasons set forth in the Motion (Motion at 8-9).

CONCLUSION

Based on the foregoing and for the reasons set forth in the Motion, Member Schiffer must recuse herself from the instant matter.

Dated: December 19, 2013

Respectfully Submitted,

/s/ Stanley Brown

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Exhibit A

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NLRB Member's Recusal Sought In Faculty Organizing Case

By **Ben James**

Law360, New York (December 06, 2013, 5:49 PM ET) -- National Labor Relations Board member Nancy Schiffer should step away from a long-running legal battle over whether Pittsburgh, Pa.-based Point Park University faculty members can unionize because of her previous employment as an AFL-CIO attorney, the school told the NLRB last week.

The university's motion for recusal arguing that having Schiffer adjudicate the case, which stems from the Newspaper Guild of Pittsburgh/Communications Workers of America Local 38061's push in 2003 to organize a group of full-time Point Park faculty members, would violate due process as well as ethical rules.

Schiffer, who started working in the AFL-CIO general counsel's office in 2000 and retired from her post as associate general counsel in July 2012, was still onboard at the labor federation when it filed a joint brief with the Newspaper Guild in the Point Park case, the motion asserted. If Schiffer directly took part in preparing the July 6, 2012, brief, then "fundamental fairness considerations" demand that she recuse herself, Point Park said.

"Even assuming arguendo that Associate General Counsel Schiffer did not directly participate in preparing the joint brief, the arguments and positions advanced in the joint brief fall within the scope of her responsibilities at the AFL-CIO," the motion said.

Pittsburgh-based Point Park's case, which turns on whether the faculty members are "managerial employees" who aren't covered by the National Labor Relations Act, has already been up to the D.C. Circuit and back. Despite the university's objections, an election was held and the union won NLRB certification in 2004, but Point Park refused to recognize the union or bargain with it.

That led the union to file a NLRB charge over the failure to bargain, and that dispute made its way up to the D.C. Circuit, which ruled in Aug. 2006 that the NLRB had failed to adequately explain why the faculty members' role at the school was not managerial and remanded the case to the labor board.

In May 2012, a divided NLRB called for briefs in the case, which set the stage for the July 6, 2012, joint brief from the Newspaper Guild and AFL-CIO.

Point Park argued Wednesday that due process mandated Schiffer's recusal, pointing to a 1979 Ninth Circuit decision in a case called American General Insurance in which a Federal Trade Commission member was disqualified from a case because of his prior involvement as counsel.

Former labor board member Craig Becker recused himself from a case in which he had co-

authored a joint brief on behalf of the AFL-CIO and the United Auto Workers, which was the respondent in that case, the motion said.

The motion also argued that Schiffer had to recuse herself under 28 USC section 455(a) — a provision of federal law that says that any U.S. "justice, judge or magistrate" should disqualify herself in proceedings in which her impartiality might be reasonably questioned. It's "generally accepted" that section 455's standards apply to administrative agency officials, including NLRB members, Point Park said.

Counting Schiffer, there were just eight lawyers in the AFL-CIO' general counsel's office "at all relevant times" the motion said, adding that Schiffer's time at the AFL-CIO overlapped with the employment of attorneys James Coppess, Matthew Ginsburg and Lynn Rhinehart, who were all signatories on the joint brief. Coppess argued argued on behalf of the union at the D.C. Circuit in 2006.

A different provision — section 455(b)(2) — also warrants Schiffer's recusal, according to the motion.

Point Park's motion said that Schiffer should recuse herself, or the NLRB should have an evidentiary hearing to examine her role in the case.

Jubelirer Pass & Intrieri PC's Joseph Pass, an attorney for the union in the Point Park case, said that he had expected that Schiffer would refrain from taking part in the case and said it looked like counsel for the university was "trying to pad the bill."

He also called the delay in the case ridiculous. "Justice delayed is justice denied," Pass said.

An attorney for Point Park declined to comment on Friday.

Point Park is represented in this matter by Arnold Perl and Brandon Pettes of Glankler Brown PLLC.

The Newspaper Guild of Pittsburgh/Communications Workers of America is represented by in-house lawyer Mary O'Melveny, James Coppess of the AFL-CIO and Joseph Pass and Barbara Camens of Jubelirer Pass & Intrieri PC.

The case is Point Park University, case number 06-RC-012276 at the National Labor Relations Board.

--Editing by Stephen Berg.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this document is being served this day upon the following persons by electronic filing:

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Dated this 19th day of December, 2013

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